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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,
Appellants

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE, and DEMOCRATIC PARTY OF WISCONSIN,
Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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May 29, 1980

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I. THE STATE HAS MISSTATED THE ISSUE.

The State of Wisconsin has totally mischaracterized the questions presented by this appeal in its Motion to Dismiss or Affirm ("Motion"). According to the State, the issue is whether it may constitutionally force the Party to accept a private, rather than a public, declaration of support as the standard for participating in its candidate selection process. The State

implies that the only conflict between the statute and the Party's rule is whether Democrats declare their affiliation publicly or privately.[1]

While the question described by the State would be substantial enough to warrant this Court's attention, the State has nevertheless misstated the issue through its erroneous portrayal of the statute. No one even moderately familiar with nominating processes believes that an "open primary" law limits voting in a party primary to party adherents. The Wisconsin law is a classic "open primary" statute: anyone may vote in any party's primary without regard to party affiliation or adherence. And for years Republicans, independents, and other non-Democrats have crossed over to vote in the Wisconsin Democratic primary. Jurisdictional Statement at 17-18.[2] Further, nothing in the Wisconsin Court's decision would alter the "open" operation of the state's statute.

Yet, as noted in the Jurisdictional Statement, the Party's rule allows only publicly affiliated Democrats to participate in choosing the Democratic candidate. The rule screens out those whose interest in the Party's political values and electoral success is so slight, tenuous and/or fleeting that he or she refuses to stand up and be counted. The open primary statute clearly abrogates Rule 2A by requiring the Party to accept crossovers.

The State has tried to minimize the irreconcilable and material conflict between the open primary law and the rule by mischaracterizing the operation of its statute. Contrary to the State's view, the fundamental question presented by this appeal

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[1] Because a voter may vote on only one party's ballot, the State claims that only Democrats are able to vote in the Democratic primary.

[2] Indeed, in the Wisconsin Supreme Court the State's Attorney General vigorously defended the "right" of independents and Republicans to vote in the Democratic primary. Jurisdictional Statement at 19.

is whether Wisconsin may, under the First and Fourteenth Amendments, require the Party to accept the influences of non-Democrats in its candidate selection processes.

II. TO ESTABLISH A BURDEN ON THE EXERCISE OF ITS RIGHTS, THE PARTY HAD NO OBLIGATION TO PROVE THAT IT HAD CHOSEN THE MOST EFFECTIVE MEANS FOR CONDUCTING ITS POLITICAL AFFAIRS.

The State's principal contention—that the Party failed to show a burden on the exercise of its rights—rests on a distorted view of the First Amendment. Apparently, in the State's view the First Amendment only affords the Democratic Party the right to advise the State of its objective and to try to prove to a state court that the means it chose for achieving the objective are sufficiently effective to warrant Constitutional protection. But, freedom of association would mean little if the First Amendment conferred no more than a right to prove to a state court that the party had made the most effective political choice.

In any event, the Party's choice was founded both on experience and study. Jurisdictional Statement at 5. From 1968 on the Party tried increasingly strong measures for eliminating the diluting influence of crossover voting.[3] After 1976 the Party adopted Rule 2A, based in part on studies of the Wisconsin experience.[4] Although the Party has no obligation in establishing a burden to show more than Wisconsin's direct infringement on the exercise of its rights, it had an ample factual basis for establishing Rule 2A.

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[3] *Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection* at 47 (1970); *Democrats All: A Report of The Commission on Delegate Selection and Party Structure* at 2, 9, 15 (1973); *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* at 68-70 (1978).

[4] See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* at 68-70.

III. THIS COURT'S DECISION IN *MARCHIORO v. CHANEY* IS TOTALLY INAPPOSITE BECAUSE THERE THE CHALLENGED STATUTE IMPOSED NO BURDEN ON THE PARTY'S EXERCISE OF ITS RIGHTS.

The State's citation of *Marchioro v. Chaney*, ____U.S. ____, 99 S.Ct. 2243 (1979), is totally inapposite. In *Marchioro* the Court did not uphold, as the State contends, state regulation of political parties "in recognition of the critical role played by political parties in the process of selecting and electing candidates for state and national office". Motion at 7. On the contrary, the Court expressly noted that the question was not presented in *Marchioro*. *Id.* at 2247 and n.12.

In *Marchioro* the Washington state statute required the state party to have a central committee consisting of two persons from each county in the state. This committee would perform statutorily defined duties related to filling vacancies on tickets, providing for the nomination of electors and other similar functions. Those challenging the statute did not complain about the requirement that a state committee composed as prescribed perform the statutorily listed functions. They complained instead that the statute precluded the use of a more broadly based party institution to perform functions other than those prescribed in the statute—such as fund-raising. The Court found that the challengers had not shown a burden on their rights, because the party clearly could have assigned the non-statutorily prescribed duties to another, more broadly based body. The state party then, unobjectionably, could have left the statutorily prescribed duties to the statutorily composed committee. Therefore, there was no conflict between the statute and the state party's preferences for organizing itself.

In contrast, the Wisconsin statute interferes directly with a Party political preference of fundamental importance. *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), is directly on point. Jurisdictional Statement at 10-13. If *Cousins* has any vitality at

all, it precludes a state from forcing a political party to allow non-adherents to influence its candidate selection. That is the fundamental constitutional question squarely presented in this case.

IV. CONCLUSION

For these reasons the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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